IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JAIPUR

BENCH, JAIPUR

ORDER

S.B. Civil Regular First Appeal No. 49/1981
against the judgment and decree dated 18.02.1981 in Civil Suit No. 12/1980 for partition

Shri Abdul Basheer through L.R.s & Ors.

Versus

Shri Abdul Kareem & Ors.

And

S.B. Civil Regular First Appeal No. 53/1981
against the judgment and decree dated 18.02.1981 in Civil Suit No. 12/1980 for partition

Abdul Kareem & Ors.

Versus

Kamruddin & Ors.

Date of order :: September 19,2007

PRESENT
HON'BLE DR. JUSTICE VINEET KOTHARI

Mr. R.P. Agrawal for the appellant-defendants
Mr. S.M. Mehta, Sr. Counsel with Mr. Anil Mehta for the respondent-plaintiffs
Mr. V.L. Mathur for the the respondents (purchaser) in S.B. C.F.A. No. 53/1981

REPORTABLE

BY THE COURT:

1. These two cross appeal arise out of the impugned judgment and decree of partition dated 18.02.1981, whereby the learned Additional District and Sessions Judge No. 6, Jaipur decreed the suit for partition filed by Abdul Kadar S/o Ismail Khan, Smt. Hameedan and Smt. Nazeeran against the defendant No. 1 Kamruddin, purchaser of a portion of the property in the possession of defendant No. 2 Abdul Basheer, defendant No. 3 Abdul Hakeem and defendant No. 4 Abdullah, all later three being sons of Azimulla, who was son of Ismail from his first wife.

2. The plaintiffs are descendants from the second wife of Ismail Khan and during the pendency of the suit itself, the son Abdul Kadar died and his LRs, namely plaintiff No. 1/1 Abdul Kareem and 1/2 Abdul Shakoor were brought on record.

3. The plaintiffs Abdul Kadar and others filed the suit on 05.07.1979 claiming share in the property left by Ismail Khan, namely 4 shops situated at Chaukdi Topkhana Hazuri, Jaipur

having Chabutara infront of the said four shops and some construction on the two shops on the first floor and second floor. According to the plaint, the said Ismail Khan, who expired in the year 1915, i.e. 09.08.1915, had two wives and from the first wife, whose name has not come on the record, he had one son Azimulla, whose sons are the defendant No. 2, 3 and 4 and from the second wife Smt. Munni, he had one son Abdul Kadar and from his daughter Kareeman, who had two daughters, namely Smt. Hameedan and Smt. Nazeeran, who are plaintiff No. 2 and 3. It is further alleged in the plaint that on 14.04.1964, after the death of Azimulla, 3 sons of Azimulla, namely Abdul Basheer, Abdul Hakeem and Abdullah, defendant No. 2, 3 and 4 sold the upper portion in the two shops (Northern side) alongwith staircase by a registered sale deed to one Kamruddin, the defendant No. 1. It is further the case of the plaintiffs that the defendant No. 1 Kamruddin filed a suit for possession against the defendant No. 2, 3 and 4 as they forcibly took over the possession of the said portion of the property sold to Kamruddin and that suit was decreed and such

decree for possession was upheld even by rejection of second appeal filed by the defendants before this court vide judgment dated 26.04.1979. After the dismissal of the said second appeal, the plaintiffs filed the present suit on 05.07.1979 claiming partition of the said property.

4. The defendants came up with the case that the entire property belonged to late Shri Ismail Khan who had expired in the year 1915 and even during his lifetime when he married his second wife Smt. Munni, he had partitioned the said property by way of family arrangement and had given two shops on the Northern side with upper construction therein to his son Azimulla from his first wife and the remaining two shops were given to his second wife and her descendants and thus, both the families with two wives of Ismail Khan lived in separate and determined portions of the said property. After the death of Ismail Khan as well as Azimulla, sons from the second wife of Ismail Khan, his three sons, namely defendant No. 2, 3 and 4 Abdul Basheer, Abdul Hakeem and Abdullah sold the upper

portion situated on the Northern side two shops which was in the possession of Azimulla and his mother, namely the first wife of Ismail Khan right from the beginning, to defendant No. 1 Kamruddin and there was no grievance raised by the plaintiffs against the same and the said defendant No. 1 Kamruddin was put in possession upon such sale. When he was forcibly dispossessed by the plaintiffs, the said Kamruddin filed the suit for possession which was decreed by the trial court on 24.04.1971 decreeing the Civil Suit No. 298/1970, against which Civil Appeal No. 48/1972 filed was also rejected by the learned ADJ, Jaipur City on 18.11.1972 and the second appeal filed by the Abdul Kadar and others Vs. Kamruddin and others was also dismissed by this court on 26.04.1979. It is only after rejection of the said second appeal, the plaintiffs filed the present civil suit for partition which has been decreed by the impugned judgment and decree dated 18.02.1981, against which the present first appeal has been filed by the defendants, namely First Appeal No. 49/1981 Abdul Basheer & Ors. Vs. Abdul Kareem & Ors. The learned trial court on the

basis of the pleadings of the parties framed the following issues :-

(i) Whether the suit property is the property left by Ismail Khan and at the time of his death Smt. Munni and Abdul Kareem were also alive.

(ii) Whether Ismail Khan during his lifetime had given two shops (Northern side) to Azimulla and two shops (Southern side) to Abdul Kadar, having partitioned his property and since then the plaintiff No. 1 and Azimulla and defendant No. 2 to 4 are in possession and enjoying the said property in the said manner.

(iii) Whether Ismail Khan had not given any share to Mst. Kareeman and if so, what is effect thereof on the suit.

(iv) Whether after partition by Ismail Khan, the defendant No. 2 to 4 and their father had constructed respective portions

on the first and second floor over their shops and the plaintiff No. 1 had constructed on the shops belonging to him and had kept their separate tenants and whether defendant No. 2 to 4 are the sole owner and in possession of the said portion of the Northern side and had sold the first and second floor portion on 14.04.1964.

(v) Whether the principles of res judicata apply in the present case.

(vi) Whether the court fees is deficit as the valuation of the suit property is Rs. 60,000/- and the court fees ought to have been paid accordingly.

(vii) Relief.

5. The plaintiff in support of the plaint examined P.W.1 Abdul Shakoor, P.W.2 Mehmood Khan and P.W.3 Mammu Khan and produced documentary evidence in the form of Ex.1 power of

attorney, Ex.2 Naksha Vafat, Nagar Parishad, Jaipur dated 09.08.1915, Ex.3 Naksha Vafat, Nagar Parishad, Jaipur dated 21.02.1917 and Ex.4 map of the suit property and the defendants examined D.W.1 Kamruddin, D.W.2 Abdul Basheer, D.W.3 Abdullah, D.W.4 Haziullah and D.W.5 Abdul Shakoor and produced the documentary evidence Ex.A/1 judgment of the High Court dated 26.04.1979, Ex.A/2 judgment of the Additional Munsiff Magistrate No. 1, Jaipur dated 24.04.1971, Ex.3 decision of the ADJ No. 2, Jaipur dated 18.11.1972 and Ex.4 general power of attorney and Ex.DW5/A1 Notary Public Register.

6. After recording the evidence, the trial court proceeded to decide the issues in the following manner. The issue No. 1 was partly decided in favour of the plaintiff that the first floor and the four shops were constructed by Ismail Khan during his lifetime and at the time of his death Smt. Munni and Abdul Kareem were also alive. Issue No. 2 was decided by holding that the second floor construction on the Northern side two

shops was got done by Azimulla and he was in possession and enjoying the said portion. Issue No. 4 was decided by finding that Ismail Khan during his lifetime had not partitioned the suit property. Issue No. 3 was decided against the defendants by holding that Ismail Khan had not given any of his property to Mst. Kareeman and there was no evidence that the daughters of Kareeman, namely plaintiff No. 2 and 3 have relinquished their right in the said property. Issue No. 5 relating to res judicata was decided against the defendants by holding that principles of res judicata do not apply in the present case. Issue No. 6 relating to court fees was also decided against the defendants. While deciding the issue No. 7 relating to relief, the trial court found that four shops constructed by Ismail Khan were liable to be partitioned and thus, the trial court determined the respective shares of the concerned parties and thus, the suit was decreed accordingly.

7. Mr. R.A. Agrawal, learned counsel for the defendant-appellants submitted before this court that firstly the suit itself

filed by the plaintiffs was barred by limitation by virtue of Article 110 of the Limitation Act, 1963, which is quoted hereinbelow for ready reference :-

Description of suit	Period of limitation	Time from which period begins to run
110. By a person excluded from a joint family property to enforce a right to share therein.	Twelve years	When the exclusion becomes known to the plaintiff

8. He submitted that since Kamruddin had filed a suit for possession against the present plaintiffs, the heirs of second wife of Ismail Khan and they had failed upto this court when their second appeal was rejected by this court on 26.04.1979, thus, they were fully aware of their exclusion from the joint family property on 14.04.1964 when the said portion of property belonging to descendants from the first wife of Ismail Khan was sold to Kamruddin and therefore, the suit for partition could be filed only within 12 years from the said date, i.e. 14.04.1964. But since the present suit was filed on 05.07.1979, the said suit was apparently barred by limitation and he submitted that despite an objection to this effect having

been raised in the written statement, the learned trial court did not frame any issue with regard to limitation and he submitted that suit was clearly barred by limitation.

9. He has further relied upon the decision of the Hon'ble Supreme Court in the case of ***Gulam Abbas Vs. Haji Kayyam Ali & Ors.*** reported in AIR 1973 SC 554. Para 16 and 17 of the said judgment are reproduced hereinbelow for ready reference :-

> *"16. As our law relating to family arrangements is based on English law, we may refer here to a definition of a family arrangement in Halsbury's Laws of England, 3rd Edn. Vol. 17, p. 215-216 where we find: "A family arrangement is an agreement between members of the same family intended to be generally and reasonably for the benefit of the family either by compromising doubtful or disputed rights or by preserving the family property or the peace and security of the family by avoiding litigation or by saving its honour". We also find there: "The agreement may be implied from a long course of dealing, but it is more usual to embody or to effectuate the arrangement in a deed to which the term 'family arrangement' is applied". It is pointed out there: "Matters which would be fatal to the validity of similar transactions between strangers are not objections to the*

binding effect of family arrangements".

(17) As we have already indicated, it is enough for the decision of this case that the plaintiff and defendant No. 4 were estopped by their conduct, on an application of Section 115 Evidence Act, from claiming any right to inheritance which accrued to them, on their father's death, covered by the deeds of relinquishment for consideration, irrespective of the question whether the deeds could operate as legally valid and effective surrenders of their spes successionis. Upon the facts and circumstances in the case found by the courts below we hold that the plaintiff and defendant No. 4 could not, when rights of inheritance vested in them at the time of their father's death, claim these as such a claim would be barred by estoppel."

10. He further submitted that the family arrangement made by their ancestor Ismail Khan during his lifetime at the time when he contracted his second marriage with Smt. Munni by giving portion of the property, namely two shops on the Northern side and construction made thereon, to the descendants of the first wife and on the other hand two shops on the southern side to his second wife and her descendants and he further submitted that evidence has come before the trial court that all the deliveries of children of the second wife

of Ismail Khan Smt. Munni had taken place in these two very shops given to the second wife and her descendants and therefore, the said partition in the form of such family arrangement was binding on the plaintiffs and they estopped from claiming any share in the Northern side portion of the property given by said Shri Ismail Khan to the first wife and her descendants.

11. On the side opposite, Mr. Anil Mehta, learned counsel for the plaintiff-respondents urged that there is no question of applying the principles of res judicata on the basis of the judgment in a suit for possession filed by Kamruddin as that was an entirely different issue. He also submitted that the present suit filed for partition could not be held to be barred by limitation as there is no question of limitation prescribed for suits for partition and even if no issue was framed in this regard, the suit itself could not be held to be time barred. He further submitted that there was no family arrangement or partition of the property as contended by the defendants and

therefore, the suit was rightly decreed by the trial court and the defendants' appeal deserves to be rejected and the cross appeal filed by the plaintiffs deserves to be allowed. For res judicata issue, he relied upon the decisions of Hon'ble Supreme Court in the case of *Deva Ram & Anr. Vs. Ishwar Chand & Anr.* reported in (1995) 6 SCC 733 and *Mohan Vs. Anandi (Smt.) & Ors.* reported in (1996) 7 SCC 734.

12. Having heard the learned counsels and upon perusal of the record and evidence before the trial court, this court is of the opinion that the defendants' appeal deserves to be allowed the the cross appeal filed by the plaintiffs deserves to be dismissed.

13. That as far as question of limitation is concerned, it is true that the trial court ought to have framed an issue on the question of limitation because that is a basic issue and the same deserves to be decided as a preliminary issue. Since an objection was raised in the written statement by the

defendants that the suit was barred by limitation by virtue of Article 110 quoted above, it is felt that the trial court ought to have framed an issue in this regard. But at the same time, the fact of sale to Kamruddin made on 14.04.1964 being not in dispute from the side of plaintiffs, though right to sell the said portion to Kamruddin of the defendants was in question, but in the opinion of this court, Article 110 of the Limitation Act, 1963 quoted above would clearly apply in the present case. The very fact that the present plaintiffs dispossessed the purchaser Kamruddin from the portion of property purchased by him from Azimulla's sons and thereupon he had filed a suit for possession which was decreed against them and such decree was upheld upto the High Court, is sufficient to prove that the plaintiffs had become aware of exclusion from joint family property right at the beginning of such litigation by Kamruddin or just after 14.04.1964 and therefore, to enforce their right to share therein would be governed by Article 110 of the Limitation Act and the period of limitation started to run from 14.04.1964 itself, the date of sale in favour of

Kamruddin. Since admittedly the present suit was filed on 05.07.1979 after about 15 years from the date of said sale in favour of Kamruddin, the suit is apparently barred by limitation. Therefore, even though the principles of res judicata may not apply in the present case as the nature of the two suits was different, still the present suit to enforce their right of share in the joint family property assuming it to be so, had to be filed within 12 years from plaintiff's exclusion from such joint family property, which was apparently within the knowledge of the plaintiffs right from the year 1964, as they tried to take forcible possession of the said portion sold to Kamruddin, for which Kamruddin had to litigate by filing of a suit for possession, which was upheld upto the High Court.

14. Further from the facts obtaining in the present case, namely, the entire property having been constructed during the lifetime of Ismail Khan and he having married to two wives and the fact that two wives were living in two different portions, coupled with the fact that the second wife Smt. Munni delivered

all her children in the said southern side two shops belonging to Ismail Khan throughout, is sufficient in the opinion of this court to establish that at the time of second marriage of Ismail Khan, he had *de facto* partitioned his property in these two portions and both the branches of his family through his two wives were living in and enjoying such two different portions of the property. In view of the judgment of the Hon'ble Supreme court in the case of Gulam Abbas Vs. Haji Kayyam Ali & Ors. (supra), respectfully following the said said decision, this court is of the view that a family arrangement is an agreement between the members of the same family intended generally and reasonably for the benefit of the family, either by compromising doubtful or disputed rights or by preserving the family property or the peace and security of the family by avoiding litigation and such agreement may be implied from a long course of dealing. Therefore, in view of a long and continued possession and enjoyment of the respective portions of their properties, this court is of the view that the plaintiffs are estopped from claiming the partition of the entire property

and claim their share on the Northern side two shops and construction thereon.

15. Accordingly, the suit filed by the plaintiffs is required to be dismissed both on the ground of limitation as well as on merits. Thus, the defendants' Civil First Appeal No. 49/1981 Abdul Basheer & Ors. Vs. Abdul Kareem & Ors. is allowed and the cross appeal filed by the plaintiffs namely Civil First Appeal No. 53/1981 Abdul Kareem & Ors. Vs. Kamruddin & Ors. is dismissed. The impugned judgment and decree dated 18.02.1981 is set aside and the Civil Suit No. 12/1980 filed by the plaintiffs is rejected. Parties shall bear their own costs.

(Dr.VINEET KOTHARI),J.

Pramod
Item No. S-1